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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 33

JAMES P. MITCHELL, SECRETARY OF LABOR, PETITIONER

v.

OREGON FROZEN FOODS CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondents' brief (supported in part by the *amicus curiae* brief) makes two contentions that were not raised in the lower courts and accordingly were not considered in our main brief: (1) that the Administrator's "first processing" determination under § 7(b)(3) is invalid;[1] and (2) that the Government

[1] We concede that a respondent is normally not limited, in defending a judgment in his favor, to the grounds relied upon in the lower courts. In this case, however, the issues were expressly limited, by agreement of the parties and the order of the district court, to those stated in the pretrial order (R. 13–32). Respondents' contentions were there limited to the claim that the post-seasonal operations were part of the "first processing" within the meaning of the § 7(b)(3) determination, and in no way implied a challenge to the validity of that de-

conceded that repackaging is a part of "first processing" when performed during the active harvesting season and it must follow that it is still "first processing" when performed after the season.

I

THE ADMINISTRATOR'S "FIRST PROCESSING" DETERMINATION UNDER § 7(b)(3) IS VALID

Both respondents and the *amicus curiae* contend that the Administrator had no authority to make a "seasonal nature" finding and determination restricted to the "first processing" branch of an industry and that Oregon is "entitled" to the exemption despite the Administrator's findings and determination (Resp. Br. 12–16; Amicus Br. 10–15). That contention is not only contrary to the express statutory terms of § 7(b)(3), but is inconsistent with the legislative intent as evidenced both by the legislative history of its original enactment and by subsequent legislative approval of the long-standing administrative interpretations, regulations and orders issued under § 7(b)(3).

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termination (see R. 29–30), in sharp contrast to respondents' express (now-abandoned) challenge to the validity of the definition of the "area of production" for purposes of § 13(a)(10) (R. 28-29). The pretrial order concluded by providing that "there are no other issues of fact or law except as embodied in this Order," which "will control the course of the trial and shall not be amended except by consent of the parties and the court or by the court to prevent manifest injustice" (R. 32). We doubt that justice requires that respondent be relieved of its stipulation in order to present here for the first time an issue neither raised nor developed in the lower courts.

1. The § 7(b)(3) exemption is not self-executing but applies only to employees "in an industry found *by the Administrator* to be of a seasonal nature" (emphasis added). The only such determination of the Administrator claimed in the lower courts to be applicable here is the determination that "The first processing and canning of perishable or seasonal fresh fruits and vegetables is a branch of an industry and of a seasonal nature" within the meaning of that section (see Pet. Br. 4, 26–27).[2] Respondents and *amicus curiae* contend, in effect, that that determination is invalid because the Administrator has no authority to define an "industry" in terms of specific operations ("first processing") but must use a more general category. We may pass over the difficulties of respondent's attempt to establish an exemption by challenging the validity of the very determination under which the exemption is claimed (see *Addison* v. *Holly Hill Co.*, 322 U.S. 607),[3] for we think it clear

[2] There is a suggestion in respondents' brief (p. 14) that they are now, for the first time, alternatively claiming exemption under the industry determination for the "packing, handling, and preparing in their raw or natural state of perishable or seasonal fresh fruits and vegetables" (see R. 45). As respondents elsewhere concede (Br. 5), however, freezing is clearly "processing" (see also Pet. Br. 13–14, n. 8) during which the vegetables lose their "raw or natural state." The separate industry determinations for the "first processing and canning" of vegetables (R. 46) and for handling them "in their raw or natural state" (R. 45) are concerned with different operations, and frozen-food processing must qualify, if at all, under the former.

[3] Even if the Administrator's limited determination were invalid, it would not follow that respondents are entitled to any broader exemption. See *Holly Hill*, *supra*, 322 U.S. at 619.

that the determination was fully within the powers of the Administrator.

a. The statute itself indicates that the Administrator was intended to have a considerable measure of discretion and flexibility in defining "industries" for purposes of § 7(b)(3) determinations in order to limit the exemption to particular seasonal *parts* of industries. That is evident from the flexible definition of "industry", in § 3(h), as including a "branch" of a "trade, business, [or] industry." That definition has long been construed, in cases arising under the wage order sections of the Act, as giving the Administrator "a large measure of discretion" in prescribing the industries, or branches, subject to "industry" wage orders, including discretion to limit the application of a wage order to "a particularized section of an industry" and to deal separately and differently with "parts of an industry." See *Southern Garment Manufacturers Ass'n* v. *Fleming,* 122 F. 2d 622, 629–630 (C.A.D.C.); see also *Opp Cotton Mills* v. *Administrator,* 312 U.S. 126, 149–150; *Columbus & G. Ry. Co.* v. *Adm'r of Wage and Hour Div.,* 126 F. 2d 136, 139 (C.A. 5); *Pearson* v. *Walling,* 138 F. 2d 655, 657 (C. A. 8), certiorari denied, 321 U.S. 775.

The Administrator's discretion to determine what is a seasonal "industry" for purposes of § 7(b)(3) is,

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Since Congress expressly made this exemption dependent upon a finding by the Administrator, it would "fly in the face of Congressional purpose" (*id.* at 620) to assume that the Administrator would have found the whole industry to be seasonal "had he known of its [the limited determination's] invalidity (id. at 619). "It is not for us [the Court] to write a definition. That is the Administrator's duty" (*ibid.*).

we submit, at least as large as his discretion to define "area of production" for purposes of the § 13(a)(10) exemption. What this Court said in *Holly Hill, supra,* is equally applicable here: "In view * * * of the variety of agricultural conditions and industries throughout the country, the bounds of these areas could not be defined by Congress itself. Neither was it deemed wise to leave such economic determination to the contingencies and inevitable diversities of litigation. And so Congress left the boundary-making to the experienced and informed judgment of the Administrator. Thereby Congress gave the Administrator appropriate discretion to assess all the factors relevant to the subject matter * * *" (322 U.S. at 614). "The Administrator fulfills his role when he makes a reasoned definition," and although "[e]xperts might disagree over the desirability of one formula rather than another", the Administrator's determination is valid if he "stay[s] within the allowable limits." *Mitchell* v. *Budd,* 350 U.S. 473, 480.[*]

[*] "* * * In a matter left specifically by Congress to the determination of an administrative body, as the question of exemption was here * * *, the function of review placed upon the courts * * * is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and an application of the statute in a just and reasoned manner." *Gray* v. *Powell,* 314 U.S. 402, 411. There can be no question that the administrative determination here in issue fully conformed with these standards.

As the record shows (R. 44–49), the specific Findings and Determination involved in this case were issued in August 1940, upon application made by "Northwest Canners Association, the Agricultural Producers Labor Committee, the Lakeland Highlands Canning Company, the West Virginia Horticul-

b. If there were ever any reason to doubt the legislative intent to grant the Administrator such discretion and flexibility in applying § 7(b)(3), it has long since been resolved by the legislative acceptance and approval of the long-standing interpretation and practice of the Administrator.

Since the very earliest days of the Act's operation, the Administrator has consistently interpreted the Act as permitting § 7(b)(3) determinations to be limited to specific parts or operations of an industry. In the Administrator's first annual report in 1939, he noted

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tural Society, and sundry other parties" (including the Northwest Frozen Foods Association of Portland, Oregon), and only after a public hearing held on such applications in July 1940 (R. 44–45), following which the presiding officer issued his report in which he determined, among other things, that "The first processing and canning of perishable or seasonal fresh fruits and vegetables is a branch of an industry and of a seasonal nature * * *" (R. 46). Notice of the determination was published in the Federal Register (R. 47), inviting any person aggrieved by the determination to file a petition for review within 15 days. No such petitions were filed by any of the industries (or by any member thereof) which had applied for the determination. The only objections came from labor organizations, which raised "a legal issue as to whether or not the exemptions provided under Sections 7(b)(3) and 7(c) * * * were intended to operate concurrently or consecutively with respect to establishments engaged in first processing of * * * perishable or seasonal fresh fruits or vegetables" (R. 48). The Administrator ruled that the § 7(b)(3) exemption was cumulative, "although it might have been construed to be alternative in the original proposition," as Senator Taft pointed out when the Act was undergoing amendment in 1949. (See Hearings before Subcommittee of Senate Committee on Labor and Public Welfare on S. 58, etc., 81st Cong., 1st Sess., p. 640.) In fact, the first administrative interpretation had been that the exemptions were alternative. See Opinion Manual of the General Counsel, Wage and Hour Division, Department of Labor (1940), pp. 94–95.

a case in which, although the industry as a whole did not qualify as seasonal, he had designated "three of the groups of operations as branches of the industry" for purposes of that section.[5] The very determination involved in this case (R. 44–49) was issued in August 1940 and has been outstanding ever since. That and numerous other determinations under § 7(b)(3) designating specified operations or activities were included in a list of such determinations (with a description of the "major operations exempt" under each) furnished to Congress when the 1949 amendments to the Act were under consideration. See Hearings before the House Committee on Education and Labor on H.R. 2033, 81st Cong., 1st Sess., pp. 90–93. Practically all of the 34 determinations on that list defined the "seasonal industry" in terms of operations or activities. As noted in our main brief, although Congress gave extensive attention to the Administrator's interpretation and practice under § 7(b)(3),[6] the 1949 Act made no change in that section but, to the contrary, gave approval by § 16(c) to the then-outstanding interpretations and rulings (see Pet. Br. 23–24).

c. While the Congressional ratification of the long-standing administrative interpretation and practice is, we submit, sufficient to establish the Administrator's authority, it is also amply supported by the legislative history of the original enactment. As clearly evidenced by that history, a construction of

[5] First Annual Report of the Administrator of the Wage and Hour Division, United States Department of Labor, 1939, p. 116.

[6] Pet. Br. 24, n. 17.

§ 7(b)(3) rigidly circumscribing the ability of the Administrator to separate those parts of an "industry" in which use of seasonal overtime is unavoidable from those in which there is no necessity for overtime would undermine the common legislative purpose underlying the several "seasonal" exemptions—namely, to allow for "seasonal activity as to which it is necessary to have quick, speedy work and where it is impractical, if not impossible, to secure labor in the community in large quantities without providing for some exemption of that type" (81 Cong. Rec. 7652).

There seems to be no legislative discussion of the specific language of § 7(b)(3) since it was added to the bill in conference.[7] It was, however, obviously intended to serve the same underlying purpose as the general seasonal exemption provision contained in the Senate bill (§ 6(c)(4), S. 2475, 75th Cong., 1st Sess.), which had spelled out the board's authority in more explicit terms.[8] The debates on the Senate bill clearly

[7] The Conference bill was, for the most part, patterned after the House bill which contained no general seasonal exemption provision (see Conference Report, 83 Cong. Rec. 9246–9255).

[8] The "seasonal" exemption provision of the Senate bill (§ 6(c)) was contained in a much broader general provision authorizing the administrative board to grant exemptions from the minimum wage or overtime requirements for "the employment of employees in any occupation upon terms and conditions prescribed by the Board * * * if the Board finds that the special character or terms of the employment or the limited qualifications of the employees makes such employment justifiable and not inconsistent with the accomplishment of the purposes of such one or more provisions of this Act." The more explicit authority in the Senate bill to grant an overtime exemption for "employment in periods of seasonal or peak activity" (§6(c)(4)) reflects, we think, only the greater specificity of the bill rather than any difference of purpose.

disclose a purpose to give broad flexibility and discretion to the administrative body (in that bill a board rather than an administrator).

The general seasonal exemption provision was closely allied in the legislative deliberations with the more specific "seasonal" exemptions provided by § 7(c), and was motivated by the same "peak season" considerations (discussed in our main brief at pp. 16–19). As explained by Senator Black, the concern was with "the necessity for excluding purely seasonal activities which cannot operate in any other way except by speeding up the work at a particular time" while avoiding extension to "institutions which are not seasonal, and which can extend their work over the year" (81 Cong. Rec. 7810).

The specific "seasonal" exemptions which were subsequently incorporated into § 7(c), and other sections, resulted from the demand that some of the seasonal exemptions should be "statutory, to be written into the law," rather than "discrimiatory, left to the board" (81 Cong. Rec. 7654). Senator La Follette, a member of the Committee, stated the reasons for the Committee's decision to vest an administrative body with discretion "to make exceptions for seasonal industries" rather than attempt to spell out specific statutory exemptions. He explained that the Committee had concluded that it would be "impossible to provide specific exemptions for industries which were seasonal in character * * * without extending the exemptions to many related activities which obviously should" not be exempt, and added that it would be "very diffi-

cult * * * to ascertain on the floor of the Senate what particular processors should be allowed an exemption on the ground that their work is seasonal in character" and which ones should not (81 Cong. Rec. 7883).

Clearly, therefore, the very reason for leaving the § 7(b)(3) exemption to a determination by the Administrator was to permit flexibility in determining what "industries" or "processes" require an exemption and to avoid exemptions so broad as to include work not affected by seasonal pressures. If, in making that determination, the Administrator is to be limited to a rigid definition of "industries" or "branches" of industries, forcing him to exempt operations not affected by seasonal pressures in order to exempt those that are, the very flexibility sought to be achieved would be defeated.

2. The only support for respondents' contention is a dictum in *Domenico* v. *Mitchell,* 232 F. 2d 112, 115 (C.A. 10), that if the determination there involved[9] purported to limit "the definition of a seasonable industry with respect to fresh vegetables to first processing it would be in direct contravention of the mandate of Section 7 (b)(3) making it the duty of the Administrator to define a seasonable industry", since the industry must "embrace all activities which reasonably relate to the handling of seasonable fruits and vegetables."

[9] The determination was for "The packing, handling, and preparing in their raw or natural state of perishable or seasonal fresh fruits and vegetables" (see R. 45 and note 2, *supra*).

The actual holding in that case was not that the specific determination was invalid but that the employer qualified for an exemption under the general "definition" of a seasonable industry contained in the Administrator's regulations. We have set out in the Appendix (*infra*, pp. 16–21) the regulations involved as they were originally issued, as they stood at the time of the *Domenico* decision, and as they have since been amended. From a perusal of those regulations, it is apparent that the Tenth Circuit misapprehended their function and effect.[10] Those regulations are not themselves operative determinations under § 7 (b)(3), but simply prescribe the procedure by which determinations can be sought by interested parties and set forth standards to guide authorized representatives of the Administrator in ruling on such applications. It is only after a specific determination has been sought and made pursuant to those regulations that an exemption under § 7(b)(3) can be claimed. In treating the regulations themselves as self-executing, therefore, the decision in *Domenico* was clearly erroneous.[11] A

[10] A misapprehension which, although apparently shared by respondents (Br. 14–15), is not shared by the *amicus curiae* (Br. 12–13) nor by any other court. That the exemption depends upon a specific finding and determination seemed clear enough to the Fifth Circuit in *Libby, McNeill & Libby* v. *Mitchell*, 256 F. 2d 832, as well as to the district courts in *Walling* v. *Peacock Corp.*, 58 F. Supp. 80, 883 (E.D. Wis., July 1943), and *Addison* v. *Holly Hill Co.* (S.D. Fla., Jan. 26, 1943, Order on Pleadings, unreported but printed in the Record of the case in this Court (October Term 1943, No. 217), p. 199).

[11] Review of that decision by this Court was not sought because it was thought that the misunderstanding of the effect of the regulations could be overcome by a clarifying amendment. That amendment has since been made (see *infra*, pp. 20–21) and makes clear that the regulations provide no more than

further error of the court (and of respondents) is that the provisions relied upon in *Domenico* (§ 526.3 *infra*, p. 21) state the standards only for determining *seasonality*, without prescribing to what group of operations the standard should be applied, a subject covered by an entirely different provision which leaves to the Administrator a large measure of discretion in defining the "industry" to be included in a determination (§ 526.2(b), *infra*, pp. 16, 20).[12]

It is of course problematical to what extent the court's comment as to the "mandate" of § 7(b)(3) was influenced by its misapprehension of the function of the regulations. Whether it can be so explained or not, however, we submit that the dictum, unsupported by any analysis of the legislative purpose or of the definition of "industry" in § 3(h) of the Act, was plainly erroneous.

II

THIS CASE INVOLVES THE STATUS ONLY OF POST-SEASONAL AND NOT OF IN-SEASONAL REPACKAGING

Respondents seek to draw support for their position that repackaging[13] is part of "first processing" from a

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standards for specific determinations and that the operations to be included in a seasonal industry "shall be limited to those specified by the Administrator in his determination."

[12] Still another error of the court was its assertion that the specific determination "does not purport to state that only such [specified] operations * * * shall constitute a seasonable industry" (232 F. 2d at 715). This is squarely contrary to the express statement at the end of that determination: "The said exemption is applicable only as specified by the aforesaid Findings and Determination" (R. 49).

[13] Respondents quibble over the use of the term "repackaging" to describe the post-seasonal operations (Resp. Br. 7; see also

claim that the Government conceded "that packaging from bulk storage during harvest season" is within first processing (Resp. Br. 9). The statement of the Government's concession is not accurate.[14] In the pretrial order (R. 13–32), there was no suggestion that repackaging was carried on during the harvesting season itself and the issues were accordingly limited to the status of the post-seasonal repackaging operations. Respondents combine that limitation of the issues in the pretrial order with the later isolated testimony of two witnesses that some corn may be repackaged during the season to produce a concession that in-season repackaging is exempt. Obviously, however, those

Amicus Br. 18, 19) is beside the point, for the crucial fact is that the operation, whatever it is called, is not an integral and continuous part of the initial series of operations, within the meaning of the regulations (see Pet. Br. 22–23), and is not within the purpose of the exemption (see Pet. Br. 15–22). The term, which admittedly has been used by all parties throughout this case (Resp. Br. 7), is in any event fully descriptive of the operation of removing the previously bulk-packed vegetables from storage and placing them in new containers. It is also, contrary to the contention of the *amicus curiae* (Br. 5), fully in accord with "common commercial usage." See, *e.g.*, *Bulk Bins Save on Frozen Food Storage*, Western Canner & Packer, vol. 49, No. 10, p. 211 (Oct. 1957); Cruess, *Commercial Fruit and Vegetable Products* (1948), p. 817; Department of Agriculture, *Technology in Food Marketing* (Monograph No. 14, 1952), p. 14.

[14] As is apparent from the context of the quotation, all that the Government conceded was that Oregon was entitled to the exemption for "the weeks * * * during the active harvesting season when Oregon was engaged in processing and freezing freshly-harvested vegetables and immediately packaging them in either consumer-size packages or bulk containers" (Pet. Br. 8).

events show only that the question has never been put in issue in this case, and not that the Government has "conceded" any general principle as to the effect of seasonal repackaging.

In any event, the effect of incidental repackaging during the season poses a very different problem from that of post-seasonal operations limited exclusively to repackaging, and the result might turn on a variety of factors not developed in this record. If, for example, as the cited testimony suggests,[15] such repackaging were done only in order that the workers standing by to handle the fresh corn would not be idle when the flow of fresh corn was for some reason interrupted, there might be good reason for not treating that occasional and insubstantial repackaging as precluding an exemption of overtime required, not for the repackaging operations themselves, but to have the workers on hand to handle the seasonal influx. If, on the other hand, the evidence indicated that the repackaging was being carried on as a substantial or independent operation in itself, with overtime being employed specifically for that purpose, employees engaged in that operation would clearly, we think, not be exempt. Those issues,

[15] R. 100:

Q. Now, during the active corn season is any of this corn taken off the lines and put into cold storage particularly during the day shift and if there is a slack period during the night shift, is that brought back out?

A. Yeah. We fill up every minute's time we can. Say, if something happened in the field so the corn wasn't flowing in at night for processing if there is any spare time at all, why, we bring it back out and we pack it then.

however, are not involved in this case, and on this record there is no occasion to examine them.

Respectfully submitted.

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NOVEMBER 1959.

APPENDIX

1. Pertinent provisions of the Regulations, Part 526 (29 C.F.R. 526), as originally issued on October 20, 1938 (3 F.R. 2534), are as follows:

Section 526.1.—*Statutory provisions.*

* * * * *

Section 526.2.—*Meaning of "industry".*

"Industry" means a trade, business, industry, or branch thereof, or group of industries in which individuals are gainfully employed.

Section 526.3.—*Industry to which the exemption is applicable.*

The exemption for an industry of a seasonal nature is applicable to an industry which both:

(a) Engages in the handling, extracting or processing of materials during a season or seasons occurring in a regularly, annually recurring part or parts of the year; and

(b) ceases production, apart from work such as maintenance, repair, clerical and sales work, in the remainder of the year because of the fact that, owing to climate or other natural conditions, the materials handled, extracted, or processed, in the form in which such materials are handled, extracted or processed, are not available in the remainder of the year.

Section 526.4.—*Application for exemption.*

Any industry, or employer, or employer group therein, may make written application to the Administrator for exemption. The application shall state the facts and reasons relied upon to show that the employer or employer group

making application is a part or the whole of an industry which meets the conditions set forth in Section 526.3. Preferential consideration will be given to applications filed by groups or organizations which are deemed to be representative of the interests of a whole industry or branch thereof.

Section 526.5.—*Procedure upon application for exemption.*

Upon consideration of the facts and reasons stated in an application, the Administrator may

(a) without further proceedings deny the application on the ground that it fails to allege facts entitling the industry to an exemption as a seasonal industry; or

(b) may set the application for hearing before the Administrator or his authorized representative; or

(c) may notify the applicant of, and publish in the Federal Register and by general press release, a preliminary determination that a *prima facie* case for the granting of an exemption has been shown. In the event that the Administrator determines that a *prima facie* case for exemption has been shown, the Administrator for 15 days following the publication of his preliminary determination will receive objection to the granting of the exemption and request for hearing from any person interested, including but not limited to employees, employee groups, and employee labor organizations, within the industry claimed to be exempt. Upon receipt of objection and request for hearing, the Administrator will set the application for hearing before the Administrator or an authorized representative. If ~~no objection and~~ request for hearing is received within 15

days, the Administrator will make a finding upon the prima facie case shown upon the application. The exemption shall become effective upon publication of the finding in the Federal Register.

Section 526.6.—*Procedure where application for exemption set for hearing.*

(a) One combined hearing may be held on two or more applications presenting related issues of fact or law.

(b) A notice of the time, place, and scope of a hearing upon an application will be published in the Federal Register and made public by a general press release at least 5 days before the date of such hearing.

(c) All persons interested, including employees, employee groups, employee labor organizations, employers, employer groups, and trade associations, within the industry affected, and designated subordinates of the Administrator, will be afforded an opportunity to present evidence and to be heard.

(d) The Administrator or his authorized representative may cause to be brought before him at such hearing any witness whose testimony he deems material to the matters in issue.

(e) The Administrator or his authorized representative, as the case may be, will make his finding upon the record made at the hearing. If the finding, made by the Administrator himself, is that the industry in question is of a seasonal nature within the meaning of Section 526.3, the exemption shall become effective upon publication of the finding in the Federal Register. If the finding is by an authorized representative of the Administrator, the further procedure set forth in Section 526.7 is applicable.

Section 526.7.—*Petition for review of finding by authorized representative.*

Where hearing is had before an authorized representative of the Administrator any person aggrieved by the finding of such representative may within fifteen days after the action of such representative file a petition with the Administrator requesting a review by the Administrator of the action of the representative upon the record of hearing before the representative. If the request for review is granted, all interested parties will be afforded an opportunity to be heard either in support of, or in opposition to, the matters prayed for in the petition. A notice of the time and place and scope of the hearing will be published in the Federal Register and made public by a general press release at least 5 days before the date of such hearing.

If no such petition for review is filed within 15 days, or if such petition is filed and subsequently is denied by the Administrator, the finding of the authorized representative shall become final. If such finding is that the industry in question is of a seasonal nature within the meaning of Section 526.3, the exemption shall become effective upon publication of the finding in the Federal Register.

If a petition for review is granted and upon hearing the Administrator confirms a finding by the representative that the industry is of a seasonal nature within the meaning of Section 526.3, or if the Administrator, rejecting a finding by the representative to the contrary, finds on the record that the industry is of a seasonal nature within the meaning of Section 526.3, then the exemption shall become effective upon publication of the Administrator's finding in the Federal Register.

* * * * *

2. Pursuant to notice published in 18 F.R. 1044, Section 526.2 of the Regulations was amended by adding to it the following subsection, effective June 29, 1953 (18 F.R. 3063):

> (b) In determining whether the operations for which exemption is sought constitute an industry or a separable branch of an industry, the following factors, among others, may be considered: The extent to which the activity carried on and the products under consideration are distinguishable from other activities and products, the geographical locations of the operations, the comparability of techniques and physical facilities with those found in other situations, the extent of integration with other operations, the extent of segregation of employees performing the operations involved, established classifications in the industry, and any competitive factors involved.

At the same time, Section 526.3 was amended by adding to it an alternative test of seasonality as follows:

> (b) An industry which:
>
> (1) Engages in the handling, preparing, packing or storing of agricultural commodities in their raw or natural state; and
>
> (2) Receives for handling, preparing, packing or storing 50 percent or more of the annual volume in a period or periods amounting in the aggregate to not more than 14 workweeks.

3. Pursuant to notice published in 22 F.R. 8018, Section 526.2 of the Regulations was amended by adding to it the following subsection, effective April 19, 1958 (23 F.R. 2601):

> (c) The operations and activities included within a seasonal industry shall be limited to those specified by the Administrator in his determination.

At the same time, Section 526.3 was amended to read as follows:

Section 526.3.—*Standards for Administrator's determination that an industry is of a seasonal nature.* The exemption provided under section 7(b)(3) shall apply only to those industries which the Administrator has determined to be of a seasonal nature. The Administrator will find an industry to be of a seasonal nature if it:

(a) Engages in the handling, extracting, or processing of materials during a season or seasons occurring in a regularly, annually recurring part or parts of the year not substantially greater than six months, and ceases production, apart from work such as maintenance, repair, clerical, and sales work, in the remainder of the year because of the fact that, owing to climate or other natural conditions, the materials handled, extracted, or processed, in the form in which such materials are handled, extracted, or processed, are not available in the remainder of the year; or

(b) Engages in the handling, preparing, packing or storing of agricultural commodities in their raw or natural state, and receives for handling, preparing, packing or storing 50 percent or more of the annual volume in a period or periods amounting in the aggregate to not more than 14 workweeks.

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